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No. 81-1863

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

UNITED STATES, ET AL.,

Petitioner,

v.

MARY T. GRACE, ET AL.,

Respondent,

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE FOR THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS

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The League of United Latin American Citizens ("LULAC) submits this brief as amicus curiae in support of Respondents with the written consent of all parties, pursuant to Rule 36.2 of this Court.

STATEMENT OF INTEREST

The League of United Latin American Citizens is a fifty-three year old non-profit organization. It is an outspoken advocate on behalf of fourteen million Hispanics, with emphasis on civil, consumer, economic, educational, employment and political rights rights of America's second largest minority.

LULAC, with approximately 100,000 members in more than forty states, is believed to be the largest national Hispanic membership organization in the

nation.

LULAC, because of its volunteer, non-profit status and the modest means of its members and the Hispanic community at-large, is particularly concerned as to:

a) the increasingly high cost of U.S. Supreme Court litigation which, in effect, precludes 95 percent of the population from access to the court;

b) the highly selective and often political nature of the cases heard by the Court;

c) the rulings of the Court that create barriers to legal access (such as restrictions on class actions and standing); and

d) the increasingly anti-civil rights posture of the Supreme Court.

These four factors often make legal

access to the Supreme Court more a fiction than a reality for Hispanics and other minorities.

LULAC therefore believes that it is especially important that no governmental statutes or regulations be permitted to hinder or interfere with the absolute right of the people to peacefully express their views, pursuant to the First Amendment, before any government institution and, in particular, the United States Supreme Court.

SUMMARY OF ARGUMENT

LULAC contends that if there is one institution in America that should have no restrictions or barriers regarding the people's First Amendment rights, it should be the United States Supreme Court.

It is ironic that the governmental institution that historically has done more to protect First Amendment rights, and is indeed considered one of the most formidable bastions of those rights in the world, should be asked to carve out a special First Amendment exemption solely for itself.

It is undisputed that freedom of expression outside federal and state courthouses, despite impressionable juries and witnesses (as well as short-term elected judges in most states), has not

cost our great judicial system its independence or its integrity. How then can it be argued that lifetime tenure of U.S. Supreme Court Justices, rendering decisions without either juries or witnesses, will be so influenced or intimidated by statements on the sidewalk that the integrity and independence of the Court will be threatened?

It is most difficult to find a compelling governmental interest in barring a few signs or chants almost a football field and two sets of massive doors from the Supreme Court chambers. How can such intimidate the United States Supreme Court, while the Washington Post, CBS News and Congress

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cannot? [1]

LULAC contends that the court is and must be the citadel and symbol of free expression. It therefore takes a First Amendment position well beyond that advocated by either of the parties. LULAC respectfully urges that this Court not only invalidate 40 U.S.C. §13k, but specifically order the Supreme Court Marshall to develop "Hyde Park" plans, to be instituted no later than July 4, 1983, to

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[1] The government's obsession with banning free expression of the people is particularly puzzling in light of the Washington Post having a vending machine on the very sidewalk barred to the public and a quasi-pornographic paper, Met Forum, "Washington's Most Complete Adult Guide" also being permitted to exercise its First Amendment rights on this Supreme Court sidewlk. (Met Forum features, for example, ads such as, "Dominant lady and submissive mate seek couples and females for B/D, fantasy fulfillment, personal surrender and erotica." October 1982 at 24)

warmly welcome and encourage any and all forms of peaceful expression, picketing and demonstrations in front of and on the Court grounds, including expressions relating to issues before the Court.

The Order to the Marshall should include, inter alia, provision for such expressions, without limits as to their content or subject matter, on the one hundred foot wide court plaza, as well as on the sidewalk in front of the Supreme Court.

The U.S. Supreme Court's posture on free expresion should be to America what Hyde Park is to Great Britain, the creator

of many of our proud common law traditions.[2]

LULAC contends that the greatest danger facing the Court is its actual and perceived isolation from the public. (For example, a majority of the Justices of the Supreme Court completed their college education prior to the advent of the Second World War and this nation has not had an Hispanic Supreme Court Justice.)

Such isolation (and attendant secrecy) when combined with an unjustified special exemption barring effective public criticism, could cause disrespect for the court

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[2] LULAC contends that this Court should not be hearing this case. Despite the justices' interest in the outcome of the case, the Court has not seen fit to disqualify itself and to defer to another federal court to resolve the issues in this case. See, e.g., 28 U.S.C. §2109.

and a questioning of its legitimacy.

In an era of unaffordable litigation, highly selective and political Supreme Court dockets, and increasing restrictions on standing and other procedural rights of access, it is particularly important that all of the people of the United States have an opportunity to peacefully express their views on all issues, including issues directly before the Court.

For the overwhelming majority of Americans that cannot afford $200-per-hour attorneys and million dollar landmark litigation, the opportunity to express their views on the steps of the Supreme Court may be as close as they will ever get to justice. The public should not be denied this opportunity, particularly not by the United States Supreme Court, one

of the most important (if not the most important) political institutions in this nation.

In summary, the Supreme Court can best protect its integrity and independence by avoiding special privileges and immunities. Instead, it should openly encourage and welcome free expression everywhere free men and women reside, including at the Court itself.

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ARGUMENT

I. UNDER FIRST AMENDMENT STANDARDS, SECTION 13k IS OVERBROAD AND VAGUE AND IS THEREFORE UNCONSTITUTIONAL

A. Section 13k Is Overbroad

It has long been recognized that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. Shelton v. Tucker, 364 U.S. 479 (1960). Thus, it has been held that "a governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP

v. Alabama, 377 U.S. 288 (1964). This overbreadth doctrine has two qualifications: enforcement of an overbroad statute is totally forbidden (1) until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression, Dombrowski v. Pfister, 380 U.S. 479 (1965); or (2) where conduct and not merely speech is involved, the overbreadth of a statute must "not only be real, but substantial as well." Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Section 13k is unquestionably overbroad because of the distinct possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

On its face, the statute deters constitutionally protected speech and conduct. For example, it would be unlawful for persons to wear buttons, armbands or other insignia publicizing their views. It would also be unlawful for schoolchildren or tour groups to "move in processions" in the area near the Court or for law students to "stand" in line waiting to hear oral argument before the Court. Similarly, it would be unlawful for attorneys or parties with cases pending before the Court to respond by talking to the press or distributing press releases on the steps of the building. The use of bus and parking signs on the sidewalks surrounding the court would be prohibited. Finally, the statute would prohibit the dissemination

of information through the use of newspaper vending machines which are presently situated on the corner. The statute reaches and punishes all forms of expression, be they speech or conduct, related or unrelated to Supreme Court business. Thus, because of the numerous impermissible applications of the statute, Section 13k causes many to refrain from constitutionally protected speech or expression.

Section 13k cannot be saved by the use of a limiting or narrow construction of the statute. In its brief, the Government urges that Section 13k has been narrowly construed by the Marshall of the Supreme Court to prohibit only picketing, leafleting, and demonstrating. Brief for Petitioner at 3. However, in

his Declaration, the Marshall stated that the statute was enforced against those persons who engaged in "expressive conduct, including carrying a sign, passing out leaflets or participating in a demonstration. . ." Declaration of the Marshall of the Supreme Court at 3. This statement does not seem to limit section 13k but rather it merely includes leafletting, demonstrating, etc. Although wearing armbands has been held to be "closely akin to 'pure speech'", Tinker v. Des Moines Ind. Comm. School District, 393 U.S. 503, 505 (1969) arguably this conduct would fall witin the category of "expressive conduct."

Were the court to interpret the statute narrowly to prohibit only leafletting, picketing, and demonstrating, section

13k would still be overbroad since it would apply to expressive conduct both related and unrelated to Surpeme Court business. Where conduct and not merely speech is involved, the overbreadth of a statute must "not only be real, but substantial as well." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Section 13k, if limited to those three forms of expressive conduct, would prohibit a substantial spectrum of conduct. The Supreme Court building houses more than the Supreme Court. It also contains a gift shop, a cafeteria, exhibits open to the public, and other offices. Section 13k would prevent picketing or demonstrations by employees who claimed they were discharged from employment illegally; or persons who claimed improper treatment by the Supreme

Court police. Additionally, persons distributing newspapers, advertisements or leaflets with religious contents would be banned from the premises, thereby inhibiting the exercise of religion. There are thus a substantial number of situations to which section 13k would invalidly apply and the potential deterrent effect on these forms of expressive conduct is therefore great. Because section 13k constitutes an excessively broad means of impinging on an area of protected First Amendment rights, the statute should be held void on its face.

B. Section 13k Is Vague.

In addition to being overbroad, Section 13k suffers from the defect of vagueness. In the First Amendment context, challenging a statute on grounds of

vagueness requires proof that the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Zwickler v. Koota, 389 U.S. 241, 249 (1967). The vagueness challenge rests ultimately on the procedural due process requirement of notice as to the proscribed conduct. Jordan v. DeGeorge, 341 U.S. 223 (1951). Additionally, one special purpose of the doctrine is to require legislatures to set "reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" Smith v. Goguen, 415 U.S. 566, 573 (1974).

A mere reading of the statute alone

substantiates the challenge of unconstitutionality. Taking the first part of the statute, "It shall be unlawful to parade, stand, or move in processions or assemblies in the Supreme Court building or grounds," it is difficult to imagine the types of activities that would not be proscribed by the statute. By itself, the mere act of parading, standing, or moving in the Supreme Court building or grounds cannot be considered conduct that requires regulation. Otherwise, persons standing at the sidewalk awaiting arrival of a bus or taxi would be in violation of the statute. Likewise, tourists posing for photographs in front of the Supreme Court building would fall within the prohibition. The descriptive terms "in processions or assemblies" render no aid in defining the

types of conduct prohibited by the statute. Thus, for example, a picture-taking session of the members of the Supreme Court assembled on the steps of the court grounds would fall within the purview of the statute.

The second part of the statute is equally unclear. That part provides: "It shall be unlawful . . . to display [in the Supreme Court building or grounds] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." This section of the statute is capable of being interpreted in various ways. As in the discussion of the overbreadth doctrine, supra, this part of the statute might prohibit the wearing of armbands and might also require the removal of the

newsstands that are presently situated on the corner of the sidewalk in front of the Court. Those persons wearing pins or buttons advocating a certain view might come within the prohibition of the statute. Similarly, persons who wear hats or other head apparel signifying their association with a religious or other group might violate the statute.

Both sections of the statute forbid the doing of an act "in terms so vague that men of intelligence must necessarily guess at its meaning and differ as to its application." 389 U.S. at 249. The law's requirement that fair notice be given as to what is prohibited conduct is not met here, since the statute is not at all clear as to what constitutes proscribed and protected conduct. Finally, the

statute must be invalidated in order to prevent "arbitrary and discriminatory enforcement." 415 U.S. at 573. The Marshall's "narrow" interpretation of the statute does not limit the statute's prohibition of certain types of conduct but merely includes the kinds of conduct to which the Marshall will attempt to enforce the statute. See discussion on overbreadth doctrine, supra. Moreover, the Marshall's power to enforce section 13k derives from a statute that delegates virtually standardless discretionary power. See 40 U.S.C. § 13c. There is neither a license nor a permit system to accomodate the First Amendment rights of the public, and section 13k constitutes a blanket prohibition on these rights.

For the foregoing reasons, section

13k must be found to be unconstitutional since it is overbroad and vague and therefore unduly burdens the exercise of First Amendment rights.

II. THE SUPREME COURTHOUSE GROUNDS ARE A PUBLIC FORUM AND ACCORDINGLY SECTION 13k IS INVALID BECAUSE IT UNDULY RESTRICTS CITIZENS' RIGHT OF ACCESS TO THE COURT.

A. The Supreme Court, As A Branch Of The National Government, Should Be Open To Citizens To Use For Expressive Activities, Especially Since It Is Viewed As The Bastion Of First Amendment Freedoms.

The Government's analysis of the public forum cases decided by the Supreme Court mischaracterizes the nature of the issue in this case. Here, the critical question is whether the expression is "basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of

Rockford, 408 U.S. 104, 116 (1972), and not whether it falls into any of the categories used in the Government's tripartite analysis. Further, the Government incorrectly argues that "Cox II establishes that courthouse grounds are not a public forum", Brief for Petitioner at 20, and that "'no matter who you are or what your grievance, you cannot picket the courthouse.'" Id. quoting Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 11, 10.

Assuming for the moment that Cox II does establish that one cannot picket a courthouse, it is Amicus' position that the grounds of the Supreme Court must be

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exempted from this rule.[3] In a sense, all courts are policy makers, yet the Supreme Court's policy-making, primarily through its interpretation of statutes and the Constitution, is far more visible than that engaged in by many lower courts. The potential applicability of the Supreme Court's cases to the entire nation also makes most of its rulings of far greater policy relevance than those of most other

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[3] The Court of Appeals held that 18 U.S.C. § 1507 addressed the government's concern of attempts to interfere with the administration of justice and also noted that a state statute modeled on section 1507 was upheld in Cox II. Grace v. Burger, 665 F.2d 1193, 1203 (D.C. Cir. 1981). However, LULAC urges that section 1507 must also be ruled unconstitutional since, as discussed below, there is no compelling government interest to support the prohibition of expressive conduct contained in that statute. In Part III, infra, LULAC demonstrates that the government's concern with the appearance of the fair administration of justice does not apply to the Supreme Court.

courts. The public reaction to the Court's policy making forces the Court to become an actor in the political system and hence subjects it to public scrutiny and criticism, much more so than in the case of other courts.

Another major way in which the Supreme Court differs from most other courts, which must take most cases brought before them, is in being able to control the cases it will hear. Perhaps most important in making the Supreme Court an exceptional court is the simple fact that it sits atop the judicial system not only of the national government but of the judicial systems of all the states. Thus, although political action can be taken to reverse or limit what the Court has done, there is no other court to which one can

appeal. The Court's ability to choose its cases coupled with its paramount position gives it rulings the widest possible influence.

Because of the Supreme Court's status both as a court and as a branch of the national government, it is an appropriate forum for the dissemination of information and ideas and is an appropriate subject of

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public opinion.[4] In fact, foremost among individual rights are those protected and established by the First Amendment, and the

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[4] It should be noted that demonstrations near the other two branches of government are constitutionally protected. See Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575, 584 (D.D.C. (three-judge court), aff'd, 409 U.S. 972 (1972) (demonstrations on Capitol grounds are permissible because Congress is appropriately subject to public opinion); A Quaker Action Group v. Morton, 516 F.2d 717, 725 (D.C. Cir. 1975) (White House area is a "unique situs" for the exercise of First Amendment rights). Additionally, no other statutes or regulations restrict First Amendment rights on courthouse grounds in the same manner or to the same extent that Section 13k does. The Supreme Court is therefore in the anomalous position of being the only court and the only branch of national government which prohibits the use of its grounds for expressive purposes. Such a position is at odds with the first Amendment principles enunciated by the Court and is incomprehensible to a society that looks to the Court for guidance and protection of its free speech rights.

Court has traditionally been viewed as the bastion of First Amendment freedoms. Given the status of the Court and its particular solicitude of First Amendment rights, it would be highly ironic for the Court to sanction the suppression of constitutionally protected speech and conduct on its own premises, while mandating otherwise in other places.

It only remains to be determined whether the expression prohibited by Section 13k is "basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. at 116. Section 13k prohibits not only pure speech, but picketing, leafletting, and demonstration as well. These forms of expression are prohibited at all times in and around the grounds of the Supreme Court

and without regard to whether they relate to judicial business. The "normal activity" of the Supreme Court consists of the terms of the Supreme Court which begins on the first Monday in October and the Court sessions continue until early July. The term is divided between "sittings" for the hearing of cases and delivering of opinions, and intervening "recesses" for the consideration of the business before the court and the writing of opinions. Sittings and recesses alternate at approximately two week intervals. The Supreme Court of the U.S. 10 (prepared by the Supreme Court Historical Society) [hereinafter cited The Supreme Court].

When the Court is sitting, public sessions begin promptly at 10 a.m. and continue until 3 p.m., with a one-hour

lunch recess starting at noon. With rare exceptions each side is allowed thirty minutes argument and generally 22 to 24 cases are argued at one sitting. No public sessions are held on Thursday or Fridays. On Fridays during and preceding argument weeks, the Justices meet to discuss the argued cases and to discuss and vote on petitions for review. Id.

The Justices are therefore in court three days a week, four hours a day during the "sittings". In sum, they are in court only 17 weeks or 51 days out of a 34-week term. The nature of the Court -- as a branch of the national government -- makes the Court a prime site for the focus of public grievances. The expression of these grievances in the form of picketing, leafletting, and demonstrating would not

materially disrupt normal Court activities, particularly since the Court is in session just a few weeks out of the entire year. Session 13k goes further than to merely prevent interference with the judicial processes. It unnecessarily and substantially infringes on First Amendment rights and is not tailored to further any compelling interest, particularly since, as discussed in Part III, infra, the Government's asserted interests do not apply here. Finally, the expressive conduct sought to be prohibited by section 13k is especially compatible with the activity in which the Court is engaged -- making law and policy which have wide-ranging impact on all segments of society.

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B. Because Access To The Supreme Court Is Restricted To Those Who Can Afford It, The Courthouse Grounds Should Be Open To The Public As An Alternative Forum In Which To Express Their Views To The Court.

Amicus in this case represents the League of United Latin American Citizens (LULAC), an organization which is deeply concerned about citizens' access to the courts. It is particularly concerned about access to the Supreme Court because of the many recent decisions that adversely affect Hispanics and low-income persons. For example, in Folie v. Connellie, 435 U.S. 291 (1978), the Court held that the state of New York could bar employment of aliens as state troopers, exercising deferential review rather than strict scrutiny for classifications based on alienage. In Mathews v. Diaz, 426 U.S. 67 (1976), the

Court upheld Congress' conditioning of alien's eligibility for participation in federal Medicare program on admission for permanent residence and continuous residence in the U.S. for five years. In 1973, a class action suit was brought by Mexican-American parents of children attending schools in Englewood Independent School District in San Antonio, suing on behalf of children of poor families residing in districts having a low property tax base. The Court held that the public school financing system which creates wealth-based classification is subject to the rational basis test rather than strict judicial scrutiny. San Antonio Ind. School District v. Rodriguez, 411 U.S. 1 (1973). This term, the Court is confronted with a case

involving Texas' attempt to bar Mexican children who don't live with a parent or guardian from being provided with free education. San Francisco Sunday Examiner & Chronicle, October 3, 1982, at A13, col. 4.

Amicus disputes the government's contention that the Supreme Court is "informed by vigorous debate within the courtroom," Brief for Petitioner at 11, 36, particularly because access to the Court is restricted to those few who can afford it and who can satisfy the Court's requirements as to who can have access and which cases can be brought.

The judicial requirements that eliminate many potential cases at earlier stages revolve around the constitutional

requirement that courts may deal only with with "cases or controversies." U.S. Const. art. III, § 2, cl. 1. These requirements include the basic rule that the Supreme Court will not issue advisory opinions, Muskrat v. United States, 219 U.S. 346 (1911); that the person bringing the case have standing to sue, see, e.g., Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968); that the case be both "ripe" and not moot, see Roe v. Wade, 410 U.S. 113 (1973); Poe v. Ullman, 367 U.S. 497 (1961); and that it not entail a "political question," Gilligan v. Morgan,

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413 U.S. 1 (1973).[5]

Other access restrictions are those that have as their underlying rationale the idea that state courts should decide as much as possible before claimants may bring cases into the federal court system and that, when such claims are brought

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5 These doctrines on access to the courts have changed over time and are dependent to a large extent on the ideology of the justices and whether or not the judicial process is viewed as a narrow, adversary forum. For example, the Warren Court generally made access to the courts easier, while the Burger Court has been considerably more restrictive. See generally S. Wasby, The Supreme Court in the Federal Judicial System 111 (1978) [hereinafter cited as Wasby]. For examples of the Burger Court's restrictive rules, see O'Shea v. Littleton, 414 U.S. 488 (1973) (denial of standing to plaintiffs who sued to obtain relief from racially discriminatory bonding, sentencing, and jury fee practices because no showing of injury); Laird v. Tatum, 408 U.S. 1 (1972) (Court refused to hear challenge to Army surveillance of civilian political activity as unripe because only a subjective "chill" to First Amendment rights involved).

into the system, review of state court decisions should be limited. Foremost among these rules are those restricting the filing of federal cases against states and state officials, see U.S. Const. amend. XI; Monroe v. Pape, 365 U.S. 167 (1962); the doctrine of abstention, Bellotti v. Baird, 428 U.S. 132 (1976); the rule that state court action be "final" so that appeal to the Supreme Court is proper, see Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975); and limitations on federal habeas corpus petitions, Stone v. Powell, 428 U.S. 465 (1976).

Despite the fact that the above-mentioned access requirements have eliminated many potential cases at earlier stages, the Court itself removes more. Since enactment of the Judiciary Act of

1925, the Supreme Court has had almost complete discretion to decide for itself what cases it would hear. J. Frank, Marble Palace: The Supreme Court in American Life, 15 (1958).

The decision whether to grant or deny review of a case is made in conference. Conferences are held in strict secrecy; only the justices attend, and no legal assistance or staff are present. A few days before the conference convenes, the Chief Justice compiles a "discuss list" -- a list of cases deemed important enough for discussion and a vote. Appeals are placed on the "discuss list" almost automatically, but as many as three-quarters of the petitions for certiorari are denied a place on the list and thus rejected without further consideration.

Guide to the U.S. Supreme Court 735 (1979) [hereinafter Guide]. A traditional but unwritten rule specifies that it takes four affirmative votes to have a case scheduled for oral argument. Id. Additionally, the justices can summarily dispose of a number of other cases through brief orders. This highly selective and discretionary procedure in which the justices decide which cases to review prevents a tremendously large percentage of

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persons from gaining access to the Court.[6]

Finally, the prohibitive costs of bringing a case to the Supreme Court are sufficient to deter most individuals who generally cannot afford to finance the costs of a lawsuit. Including filing

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6 The Court's caseload has increased steadily, reaching a total of 5,311 cases on the docket for the Term ending July 1982. In 1960, only 2,313 cases were on the docket, and in 1945, only 1,460. Plenary review, with oral arguments by attorneys, is granted in only only 180 to 200 cases per Term. The Supreme Court at 11.

This term begins with 111 hours already committed to hearing oral arguments on cases from the previous year. A maximum of 160 hours of arguments is accepted each term. San Francisco Sunday Examiner & Chronicle, October 3, 1982, at A12, cols. 1-2. Thus, while there has been a striking increase in the annual number of cases, the number of cases disposed of with full opinion has not varied significantly over the years. Accordingly, the percentage of cases in which review is granted has declined as the number of request for review has grown. G. Gunther, Cases and Materials on Constitutional Law 73 (10th ed. 1980).

fees, purchase of a transcript, and the printing of briefs, such costs may exceed $20,000 just to bring a case to the certiorari petition stage even if lawyers have donated their time. Wasby at 130 (1978 estimate).[7]

Because of the almost insurmountable obstacles in bringing a case to the Court, it is of the utmost importance that citizens who are denied access to the Court are able to express their views or grievances to the Court in some other manner. Section 13k, which dictates a blanket prohibition on expressive conduct

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[7] In the early 1950s, the five cases in Brown v. Board of Education, including the Supreme Court litigation, cost between $200,000 and $250,000. Today, of course, the figure would be much higher because of inflation. Wasby at 130.

on the Supreme Court grounds, bars a means of communiction that is "essential to the poorly financed causes of little people," Martin v. City of Struthers, 319 U.S. 141, 146 (1943), and it should therefore be ruled invalid.

III. THE GOVERNMENT'S INTEREST IN PRESERVING THE APPEARANCE OF THE FAIR ADMINISTRATION OF JUSTICE DOES NOT APPLY TO THE SUPREME COURT.

A. Members Of The Supreme Court Are Not Affected By Popular Attempts To Influence Their Decisions.

The Government in this case relies on Cox v. Louisiana, 379 U.S. 559 (1965) [hereinafter Cox II] to support its argument that the interest in preserving the appearance of the fair administration of justice is sufficient to prohibit speech in the building and grounds of the

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Supreme Court. Brief for Petitioner at 20, 25. While this is a legitimate interest as applied to other courts, it is totally inapplicable to the Supreme Court.

Unlike other courts, there are no juries or witnesses in the Supreme Court that can be swayed by public opinion or influence. Because its members are not subject to periodic re-election but are appointed for life,[8] the actions of the Justices are not influenced by popular

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[8] Length of service on the court has varied greatly, from 15 months to 36 years. See Guide at 790. The Justices serve for an average of 15 years. The Supreme Court at 8. Longevity of service is, of course, related to the composition of the Court at any given time and the manner in which cases are decided. For example, Justices William O. Douglas and Hugo L. Black, who served 36 years, 7 months and 34 years, 1 month respectively, were certainly two of the most controversial justices on the Court.

pressures in an effort to gain favorable consideration by voters. Indeed, once a nominee has been confirmed, life tennure places him or her beyond the influence of even Congress or the Executive. Note, Recess Appointments to the Supreme Court -- Constitutional but Unwise?, 10 Stan. L. Rev. 124, 139 (1957). Moreover, the only requirement for staying in office is that the members of the Court hold their offices "during Good Behavior," U.S. Const. art. III, § 1, and while there have been a few attempts to impeach some members, those attempts have never resulted in conviction. Thus, once the nominees have been confirmed and are installed as members of the Court, the public has virtually no way of ousting them from office. Furthermore, on a motion for

disqualification of one of the justices, see 28 U.S.C. § 455, under the existing practice of the Court disqualification has been largely a matter of individual decision and there is no appeal from a justice's denial of that motion. Laird v. Tatum, 409 U.S. 824 (1972 (mem.), petition for rehearing denied 409 U.S. 901 (1972).[9]

Amicus does not dispute the government's contention that the complete independence of the courts is essential to the fair administration of justice. However, as a branch of the national government, the necessity of preserving the independence

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[9] It is Amicus' position that the justices should have disqualified themselves from hearing this case, since they have an interest in the outcome of the litigation. 28 U.S.C. § 455.

of the Supreme Court is different in kind than that of the lower courts. The Supreme Court is not threatened by public influence but rather by attacks from the executive and legislative branches. In fact, the election of the justices by the people was rejected precisely because it was feared that "there would be too great a disposition to consult popularity" in its interpretation of the Constitution and other laws. The Federalist No. 78 at 465 (1961 ed.) (A. Hamilton).

Far from viewing the Court as the subject of attacks by the people, the Framers perceived the function of the Court as the protector of the people from legislative misconduct; that is, as "an intermediate body between the people and the legislature, in order, among other

things, to keep the latter within the limits assigned to their authority." Id. at 467. The independence of the judges is thus "requisite to guard the Constitution and the rights of individuals" from the "dangerous innovations in the government," Id. at 469, and not to guard against public pressures, since such pressures have no effect on the Court and its decision-making processes.

Of course, the Justices' opinions are inevitably, if not consciously, influenced by the interests of major sections of the public. But, to suggest, as the Government does here, that the Court's decisions will be motivated solely by public opinion is to ignore the restraints placed upon the Court -- they are restrained by the written Constitution,

by precedent, and by popular will expressed through the elected branches of government.

B. Because Of The Political Nature Of Their Offices And Of The Cases Before The Court, The Fear That The Justices Will Be Influenced By Public Expression Outside The Court Is Without Merit.

To argue, as the Government does here, that the Supreme Court must be free from popular political influences is to ignore the political context in which the Justices are appointed and in which they act. The very nature of the Court indicates that it is a political creature, composed of politically appointed members[10]

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10 The questioning of Supreme Court nomminees has often touched upon the most politically controversial issues before the Court. For example, Senator McCarthy pressed William Brennan for an explication of his views on "the all-important issue of whether or not communism is merely a political party or

(Footnote continued on next page)

and given the responsibility of resolving politically controversial issues.

(Footnote 10, continued)

whether it represents a conspiracy to overthrow this government." Hearings on the Nomination of William Brennan before the Senate Committee on the Judiciary, 85th Cong., 1st Sess. 18 (1957). Senators McClellan and Ervin insistently sought a declaration by Thurgood Marshall of whether he agreed with the court's then recent decisions in Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964). Hearings on the Nomination of Thurgood Marshall before the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 12-14, 53-58 (1967). Senator Kennedy tried to elicit William Rehnquist's views on the constitutionality of Congressional atempts to limit the Vietnam War, Hearings on the Nomination of William H. Rehnquist and Lewis F. Powell, Jr. before the Senate Committee on the Judiciary, 92d Cong., 1st Sess. 33 (1971); on prior restraint of the press Id. at 39; and on apportionment Id. at 56. Most recently, Sandra Day O'Connor was pressed to reveal her views on the constitutionality of abortion. See Hearings on the Nomination of Sandra Day O'Connor before the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 107-08, 198-99, 218 (1981).

Without question, the nomination and appointment of members of the Supreme Court are based on political considerations. See 127 Cong. Rec. S 10123 (1981) (citing President Reagan's pledge to appoint pro-life judges to "all levels of the judiciary"); 127 Cong. Rec. S 10131 (1981) (Statement of Senator Hatch in suport of nomination of Sandra Day O'Connor, reciting Judge O'Connor's conservative credentials); 116 Cong. Rec. 17511 (1970) (citing President Nixon's pledge to appoint only "judicial conservatives"). Moreover, it is indisputable that the Court's decisions are in some manner influenced by the personal political philosophy of its members. Although most nominees have stated their intent to

put their personal predilictions aside once appointed to the bench, some influence seems to be inevitable.

The members of the Supreme court are not immune from political pressures and public opinion. When the Court takes the lead in confronting the critical social and political issues in the national life, it attracts criticism. If certain groups in society oppose the Court on basic issues of national policy, these groups may react to the Court's decisions in various ways. They may attempt to challenge the very propriety and legitimacy of judicial review itself by removing certain types of cases from the Court's jurisdiction. See, e.g., S. 210, 96th Cong., 1st Sess. (1979) (Helms Admendment removing

jurisdiction over suits challenging State-sanctioned voluntary school prayers from the federal lower courts as well as the Supreme Court); H.R. 867, 97th Cong., 1st Sess. (1981) (depriving all federal courts, including the Supreme Court, of jurisdiction in cases involving state anti-abortion laws); S. 1005, 97th Cong., 1st Sess. (1981) (depriving all federal courts of jurisdiction to order school busing to achieve racial integration. See generally Sager, The Supreme Court: 1980 Term, 95 Harv.L.Rev. 17 (1981). Additionally, voters may elect and re-elect officials on the basis of their views about Supreme Court decisions.

Or they may attempt the more difficult process of overturning constitutional doctrines promulgated by the Court. See, e.g., U.S. Const. amend. XVI (income tax amendment passed after Court struck down income tax law as unconstitutional in Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895)).

These factors are part of the political realities that surround every major Court decision. As illustrated above, the Court is under attack daily right across the street by Congress. Yet there is no evidence that Court decisions have been so influenced by these challenges that its independence and ability to decide cases in a disinterested manner have been impaired. Similarly, there is no evidence that

leafletting, demonstrating and other forms of expressive conduct (which are far less dangerous and less threatening methods of influencing the Court) would affect the Court's processes in an adverse manner.[11]

The Government also argues that the building and grounds of the Nation's highest court should be "free from outside pressure and political controversy." Brief for Petitioner at 36.

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11 It should be noted at this point that the government's contention that demonstrations will be viewed by the public as influencing the Court is substantially undercut when it argues in the same breath that as alternatives, demonstrations are allowed across the street from the Court or on the street in front of the Court. Brief for Petitioner at 15. Either way, the supposed danger of the public's perception of influence on the Court is the same whether the demonstration occurs on the sidewalk surrounding the Court or a few feet from the sidewalk.

Amicus disputes the notion that the Supreme Court is or should be free from outside pressure and political controversy. The Court has always thrust itself into the limelight of controversy by deciding highly political cases and by these actions it is therefore properly the subject of public opinion.

Among the most political and controversial cases decided by the Burger Court was Roe v. Wade, 410 U.S. 113 (1973), where the Court held that the constitutional right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. In another major political case, the Court held that sixty-four of President Nixon's tape recordings must be turned over to the United States. The generalized

assertion of presidential privilege was required to yield to the demonstrated, specific need for evidence in a pending criminal trial. United States v. Nixon, 418 U.S. 683 (1974).

Furthermore, the Court faces the prospect of deciding highly political cases this term, including challenges to a variety of state and local restrictions on abortions; the legality of California's ban on the construction of new nuclear reactors; and a challenge to the eleven-year-old federal policy of denying tax exemptions to private schools that discriminate against racial minorities. San Francisco Examiner & Chronicle, Oct. 3, 1982, at A13, cols. 1-4.

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The Government's concern that the Court be free from outside pressure and political controversy is therefore misplaced in light of the political nature of the cases before the Court. The Court -- like any policy maker -- must and will act within the context of public opinion and influence. And the Court is and will continue to be in the center of political controversy until and unless there is some fundamental change in the constitutional distribution of governmental powers.

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CONCLUSION

Amicus urges the Court to go further than to merely invalidate Section 13k. The Court should instruct, the Supreme Court Marshall to permit and encourage any and all forms of peaceful expression, picketing and leafletting, and demonstrations in front of and on the Court grounds, including expressions relating to issues before the Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

UNITED STATES, ET AL.,
Petitioner,

v.

MARY T. GRACE, ET AL.,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this brief amicus curiae upon petitioner and respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first class postage prepaid, addressed to:

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Done this 10th day of November, 1982.

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